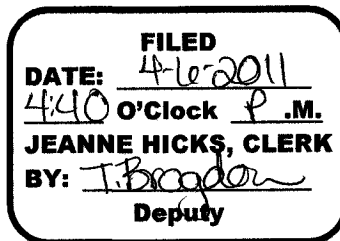


IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI



DIVISION PRO TEM B

JEANNE HICKS, CLERK

HON. WARREN R. DARROW

BY: T. Brogdon, Deputy Clerk

CASE NO. V1300CR201080049

DATE: April 6, 2011

TITLE:

COUNSEL:

STATE OF ARIZONA,

Yavapai County Attorney
Sheila Polk/Bill Hughes,
(Via OnBase)
(For Plaintiff)

(Plaintiff)

v.

JAMES ARTHUR RAY,

Thomas K. Kelly,
(Via electronic mail)
(Co-Counsel for Defendant)

(Defendant)

Luis Li/Brad Brian/Truc Do/Miriam Seifter
MUNGER TOLLES & OLSON LLP,
(Via electronic mail)
(Co-Counsel for Defendant, *Pro Hac Vice*)

HEARING ON:
TRIAL – Day 28

NATURE OF PROCEEDINGS

COURT REPORTER
Mina Hunt

START TIME: 8:44 a.m.

APPEARANCES:

Sheila Polk, Counsel for State
Bill Hughes, Co-Counsel for State
Detective Ross Diskin, Case Agent
James Arthur Ray, Defendant
Tom Kelly, Co-Counsel for Defendant
Luis Li, Co-Counsel for Defendant
Truc Do, Co-Counsel for Defendant
Miriam Seifter, Co-Counsel for Defendant
Victim Services Representative

The Court, Counsel, Detective Diskin, and Defendant are present. The Jury is not present.

Court and Counsel discuss the structure of the sweat lodges, the Court's prior 404B ruling and anticipated witness testimony. Counsel for Defendant provides a transcript to the Court of an interview with Mr. Mercer from April 5, 2011. The Court directs the Clerk to mark the transcript as an exhibit for purposes of this hearing. Counsel argue their positions and reference prior transcripts.

Counsel for Plaintiff advises of a memorandum received by Ms. Hamilton and disclosed to Counsel for Defendant. Counsel for Plaintiff discusses the content of the memorandum and requests the Defense not be allowed to pose a question along those lines.

Counsel for Plaintiff discusses pending and dismissed lawsuits against Defendant and the Hamiltons and requests the information and the fact that there is a lawsuit, that it would not be appropriate to read from the Complaint as has been the practice for past witnesses. Discussion ensues regarding the memorandum and pending lawsuits.

Oral argument ensues regarding prior sweat lodge events, prior Court ruling, causation and 403 issues, and potential risks of mistrial.

The Court advises with regard to foundation, it would be helpful if questions were phrased with Rule 602 in mind. The Court advises a finding was made in the 404B hearing that the State proved various things by clear and convincing evidence.

The Court advises what has to be avoided is testimony that does not rest on solid foundation. There has been some expert testimony and talk of the spectrum of heat related illnesses. The Court recalls witness Jennifer Haley's testimony and advises it was indicated there would be no testimony regarding prior sweat lodge events until there was expert testimony. **IT IS ORDERED** permitting the evidence. The Court advises there has to be accurate foundation. With regard to observations, if they come up regarding any kind of medical condition, there cannot be mischaracterization, it must be what was actually observed.

The Court advises with regard to Rule 403, the evidence has already come in about the extreme physical challenge and what type of mental state you might experience. The Court further advises a Rule 403 analysis has been made.

Counsel for Plaintiff advises they will restrict the witnesses to what they have observed.

~~~Recess~~~

At 10:14 a.m. Court reconvenes, all previously appearing parties are present. The Jury is not present.

Counsel for Defendant moves for a Mistrial based on the timing of this particular ruling and based on the substance of the ruling.

Counsel argue their positions with regard to the Motion for Mistrial and causation issues.

The Court advises with regard to timing, there was discussion about the potential for this evidence coming in specifically with regard to causation.

The Court advises there is no summary judgment mechanism that is available in this context.

**IT IS ORDERED** denying the Motion for Mistrial.

Counsel for Defendant requests a brief stay in the Jury Trial.

Counsel for Plaintiff opposes a stay. Counsel argue their positions.

Counsel for Defendant requests the Court refer to the interview of Mr. Mercer, page 10 and 11, line 1 and 2. Counsel for Defendant requests that to protect this Jury, a brief stay is necessary to allow the Defense team to consult whether or not they are going to file a special action. Counsel for Defendant requests a brief stay until 1:00 p.m. to address this issue.

**IT IS ORDERED** denying the request for stay.

~~~Recess~~~

At 10:40 a.m. Court reconvenes, all previously appearing parties, Victim Services Representative and the Jury are present.

Ted Mercer is sworn and testifies.

Exhibits 238, 239, 241-247, 795-797, 830, 832 and 833 are offered and admitted into evidence without objection.

The Jury is reminded of the admonition, Ted Mercer is advised of the Rule for the exclusion of witnesses and excused for the lunch recess.

~~~Lunch Recess~~~

At 1:39 p.m. Court reconvenes, all previously appearing parties and the Jury are present.

Ted Mercer resumes testimony.

Exhibits 822, 823 and 827 are offered and admitted into evidence without objection.

Exhibits 229 and 278 are admitted into evidence pursuant to stipulation of Counsel.

The Jury is reminded of the admonition, Ted Mercer is reminded of the Rule for the exclusion of witnesses and excused for a recess.

~~~Recess~~~

At 3:23 p.m. Court reconvenes, all previously appearing parties and the Jury are present.

Ted Mercer resumes testimony.

Exhibits 817-821, 825, 826 and 828 are admitted into evidence pursuant to stipulation of Counsel.

Exhibits 824 and 829 are offered and admitted into evidence without objection.

Court and Counsel conduct sidebar discussion outside of the presence of the Jury on the record.

The Jury is reminded of the admonition, Ted Mercer is reminded of the Rule for the exclusion of witnesses and excused for the evening recess. The Jury and witness exit the Courtroom.

Counsel for Defendant advises they reviewed the ruling regarding the admissibility of the prior sweat lodges and requests a clarification from the Court with regards to the scope of the ruling.

Oral argument ensues regarding foundation, witness testimony, disclosure, and witnesses.

Counsel for Defendant requests a definitive response from the Court as to what is going to be admitted so they can prepare their Defense and make legal decisions in this case. Counsel for Defendant requests notice and advises they may ask for the opportunity to amend their Trial witness list.

The Court advises cumulative testimony is not going to be permitted.

Counsel for Defendant requests clear direction from the Court of what is going to be allowed.

The Court advises the point can be made with focused clear observations that relate to observations and not opinion. Counsel for Defendant requests a definitive ruling on this issue so they can decide whether a special action is appropriate and to decide what issue would be presented on the special action.

The Court advises what is admissible are limited observations as to effects which the experts have tied into heat. The Court further advises physical causation in the testimony will not be cumulative.

The Court stands adjourned for the day.

END TIME: 4:40 p.m.

cc: Gallagher & Kennedy, P.C., Counsel for Shore Family (e)
Murphy, Schmitt, Hathaway & Wilson, PLLC, Co-Counsel for Brown Family (e)
Stone & Magnanini, Co-Counsel Brown Family (e)
Aspey, Watkins & Diesel, PLLC, Counsel for Neuman Family (e)
Steptoe & Johnson, Counsel for KPNX Broadcasting Company, TruTV and In Session (e)
Perkins, Coie, Brown & Bain, Counsel KTVK-TV (e)
Division PTB (e)
Victim Services (e)
Court Administration
Customer Service Supervisor, Verde